

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F506518

LEONA M. MIZE,
EMPLOYEE

CLAIMANT

RESOURCE POWER, INC.,
EMPLOYER

RESPONDENT

LM INSURANCE CORPORATION,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 31, 2006

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by the HONORABLE C. MICHAEL WHITE,
Attorney at Law, North Little Rock, Arkansas.

Respondents represented by the HONORABLE GUY A. WADE,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the
Administrative Law Judge filed February 17, 2006. In
said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation
Commission has jurisdiction over this claim.

2. The stipulations agreed to by the parties are hereby accepted as fact.

3. Claimant failed to prove by a preponderance of the evidence the elements of a compensable injury under the Arkansas Workers' Compensation laws.

4. The respondents controverted the claim in its entirety.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

The claimant alleges that she sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

Therefore we affirm and adopt the February 17, 2006 decision of the Administrative Law Judge, including all

findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's decision finding that the claimant was engaging in horseplay at the time of her injury and therefore did not sustain a compensable injury. After a de novo review of the record, I find that the claimant was a credible witness and that at the time of her injury, she was not engaging in horseplay. Accordingly, I would have reversed the decision of the Administrative Law Judge.

The claimant in the present case contends that her injury occurred when she twisted and fell while turning around to get a broom so she could clean her work area. The respondents contend that the claimant's injury occurred when she fell after kicking her leg while instructing a coworker how to perform an exercise.

The Majority, by virtue of adopting the decision of the Administrative Law Judge as their own, opines that the claimant's testimony was not credible. Instead, they rely on the testimony of the claimant's former coworker, Wesley Greenhaw, and find that the claimant was engaged in horseplay at the time of her injury.

I find the testimony of the claimant to be more credible than the testimony of Greenhaw. In my opinion the claimant provided consistent, credible testimony regarding the way her injury occurred. Her testimony is corroborated by the medical records reflecting an injury consistent with twisting one's knee, rather than due to a fall as asserted by the respondents. When compared to the claimant's testimony, I find the testimony of Greenhaw to be less than credible. I also find his version of how the injury occurred to be implausible.

The claimant testified that she worked on an assembly line and that when the people in front of her were behind, there would be a delay in her work. She said management instructed employees to clean their work areas when such delays occurred. Management also instructed workers that their stations had to be spotless prior to leaving at the end of the shift.

The claimant testified that employees were written up if they left their work station. She said that brooms were located in several places throughout the floor, but usually near or in work stations for convenience. She described her work area as being a two-foot by two-foot space. She indicated that a table was located behind her, and that she and Greenhaw worked "almost elbow-to elbow."

The claimant testified that on the day of her injury, a broom was leaning on a table directly behind her. She said that the line in front of her was behind and that there was a delay in her work. She described that, intending to clean her work area, she turned around to get the broom, felt a pop in her left knee, and then fell. The medical records from the time after the injury reflect that the claimant reported her injury occurred from twisting and falling at work. They also show that the claimant sustained an ACL tear due to a twisting incident at work.

The claimant admitted that she had previously sustained a bruise to her right knee. However, she denied having ever sustained any injury to her left knee. She also denied needing medical attention, taking

medication, or wearing a brace due to bruising her right knee.

The claimant readily admitted that on the day of the accident she had discussions regarding Taebo with her coworker. However, she consistently denied showing the coworker how to execute the exercise moves. The claimant instead testified that she offered to let her coworker borrow an exercise videotape. The claimant also testified that the conversations regarding exercise were prompted by Greenhaw making comments about her derriere. She indicated that she reported those comments to the Team Leader but admitted that she had no knowledge of whether Greenhaw had been reprimanded due to her report.

Greenhaw's testimony was in sharp contrast to that of the claimant. Greenhaw initially indicated that he and the claimant worked around a foot apart. He later described the area by saying, "We've got the band thing in front of us, and then Ms. Mize was on my left, and there's a table between her and Brenda, like she was saying. And then there's - - between me and her, there's like a big space. It's not two-by-two." He further indicated that behind him there was a large, open space that was over eight feet. He did not testify

as to whether there was a table located behind the claimant.

Greenhaw testified that workers were to clean their areas when they had spare time. He went on to testify that brooms were kept down the hallway to the left. He indicated the brooms were, "A pretty good ways.", from the workstations. After being asked the question, "Did she go and get a broom at the time that this happened?", the claimant gave the following testimony,

A Yes, sir.

Q She did at what point?

A Everybody does.

Q Everybody goes and gets a broom?

A Yeah.

Q Well, at the time she was kicking and doing the event and fell, did she have a broom in her hand?

A No.

Q And there wasn't a broom behind her?

A No, sir.

Q Was it time to clean up your workstation?

A No, sir.

Q When do you do that?

A Right as soon as the shift is over, they will holler cleanup.

Q Are you supposed to clean them up during the night?

A No, sir, only if you've got free time.

Greenhaw later testified that workers were required to clean up their area when they had spare time. He also said workers were required to request permission to leave their station to get a broom. Last, he asserted that when the line would start moving again, the workers never sat their brooms behind them.

With regard to the claimant's prior bruised knee, Greenhaw said that the bruise was on her left knee. He testified that prior to the incident in question, the claimant wore a brace to work and was taking medication for her knee. He also said the claimant removed the brace to show him bruising and told workers it was due to falling.

Greenhaw testified the claimant's injury occurred when she kicked her leg in the air repeatedly, and then fell. Specifically, he indicated that the claimant was facing him and was standing around a foot to a foot-and-half away when she repeatedly kicked her right leg towards him and "just fell backwards" after the last kick. When asked the reason for the claimant

hitting the ground, he indicated, "I guess when she kicked up the last time, I think she kicked her leg up too high, and then she just fell over." He was then asked "Just lost her balance?". He responded, "Yeah."

Finally, Greenhaw denied making comments of a sexual nature towards the claimant. He also denied having knowledge of her filing a complaint about any alleged comments directed towards her.

The Majority attempts to assert that the claimant was inconsistent with regard to her history on her accident. Specifically, they argue that the claimant did not report her injury as being due to a twisting incident. Their opinion finds as follows,

It was not until claimant underwent an MRI and learned that she would need to undergo surgery that she described the incident as occurring when she turned around to reach behind her and twisted and pivoted on her left knee. In fact, on June 1, 2005, claimant's history reflects that she told her family doctor that she had twisted her knee when she fell.

I note first, that the Majority incorrectly finds that the claimant did not initially report her injury as being due to a twisting incident. In fact, on the day of the injury, the claimant was seen at an emergency room and described the injury as having occurred in exactly that manner. A report entitled,

"EMERGENCY DEPT HISTORY AND PHYSICAL", from the day of the injury, indicates,

The patient states she was at work approximately (sic) midnight tonight, when she turned and twisted her left knee resulting in intense pain. The patient states she has been unable to walk on the knee since this episode. She felt a popping sensation in her left knee when she turned.

Another report, titled, "RECORD OF ASSESSMENT, DOCUMENTATION AND DISPOSITION", indicates, "States she was working @ Skill & went to turn & L knee popped." Accordingly, when reviewing the language of these two reports, it is evident that the claimant did not wait until after her MRI to report the injury occurred due to her turning and pivoting on her left knee.

Additionally, the language from the June 1, 2005, report does not indicate the claimant's injury occurred only after falling. Instead it provides, "This 21 yr old female presents for knee injury at work twisted it, knee still swollen, happened on May 14th. States she fell." In my opinion, this language in no way indicates that the claimant's injury occurred only after falling. I find instead that the report seems to indicate that the claimant fell after twisting her knee. I also note that when this language is considered with the language of the medical records from the day of the

injury, it is clear that the claimant reported twisting her knee as the cause of her injury.

The Majority also finds the claimant's credibility is diminished by arguing that she was somehow dishonest regarding whether she had past knee problems. I note that the claimant admitted she bruised her knee, indicating that she was forthcoming about her condition. Additionally, the only evidence that the claimant wore a brace or took medication was Greenhaw's testimony, which the claimant disputes. There is also no objective medical evidence to show that the claimant actually sustained any injury other than a bruise prior to the incident in question.

I also note that while the claimant's testimony was consistent, Greenhaw's was not. While Greenhaw testified that he did not work "elbow to elbow" with the claimant, he admitted that he worked around one foot from her. This is in direct contradiction to his testimony that the claimant did not work in a two-by-two space, and that there was a large space between them.

Greenhaw's testimony regarding the location of brooms and cleaning duties was also inconsistent and confusing. He testified that the claimant retrieved a broom prior to the incident in question, but then said

that at the time of the incident she did not have a broom and was not supposed to be cleaning. In an apparent contradiction, he also testified that workers were to clean when they had spare time. Even more puzzling is his testimony that workers would clean during their spare time, but when a line would resume operation, the workers would not put the brooms behind them or near their work area. I find it is simply not logical to conclude the employer would require the workers to go to a hallway a long distance away to put the brooms up especially since their work would be delayed by doing so, and the brooms would likely be needed throughout the shift.

I also find Greenhaw's testimony regarding how the accident occurred to be implausible. Greenhaw repeatedly said that the claimant was only one to one and a half feet away when she kicked at him. He indicated she was kicking high in the air, but was backed away from the table and facing him directly. If the claimant was facing him directly, I cannot imagine how she would not have kicked him if he was only a foot away. While Greenhaw attempts to assert that the claimant was backed away from the table, he never indicated if there was a table behind the claimant.

Furthermore, it would not explain how she avoided kicking him if she was only one foot away and kicking directly at him.

Finally, the medical reports indicate that the claimant suffered a tear to her ACL. Even after the records repeatedly indicated the claimant had both twisted her knee and fallen, the reports indicate that the claimant's injury was sustained during a twisting incident, rather than due to a fall. Furthermore, the medical records do not indicate that a fall would have worsened an injury due to twisting. In my opinion, this seems to indicate that twisting would be the logical reason for the claimant's injury. In contrast, Greenhaw testified that the claimant fell after losing her balance. He did not indicate that she had twisted her knee at that time or at any previous time. Accordingly, I find that the claimant's rendition of the accident is much more believable than Greenhaw's.

Last, I note that Greenhaw's credibility is further diminished due to his contradictory testimony regarding the activities of employees during delays. Greenhaw initially testified as follows,

... Sometimes we would sing -- they would sing and carry on. I don't know the lady's

name, but she would sing, too, and then they would all like dance and stuff.

Q This would be the lady next to her?

A I guess so.

However, later in the hearing, the claimant denied seeing the claimant's coworker dance. The exchange occurred as follows,

Q Mr. Greenhaw, did I understand you to testify that you had observed the lady who worked next to Ms. Mize dancing at various times also?

A No, sir.

Q You didn't testify to that earlier?

A No, sir.

Finally, I find that even if the claimant was kicking in the air and sustained an injury from falling, her actions did not constitute such a deviation from her work duties to preclude her from receiving benefits. The respondents argue that the language of Ark. Code Ann. §11-9-102 (B) (i) bars awarding benefits if the claimant participated to any extent in an activity constituting horseplay. I disagree with this assertion. Despite the amendments put into effect by Act 796, the Arkansas courts have subsequently relied on pre-Act 796 cases that define horseplay, indicating that the respondent's assertions are misplaced. As such, the

claimant's alleged deviation from duties is, in fact, a consideration regarding whether the initiation of horseplay precludes awarding benefits.

While the Majority does not address the respondent's argument regarding the effect of Act 796 on the interpretation of cases involving horseplay, they do acknowledge language from decisions prior to the law change and address the claim accordingly. Specifically, and as correctly noted by the Administrative Law Judge and Majority,

Whether initiation of horseplay is a deviation from one's course of employment depends on (1) the extent and seriousness of the deviation; (2) the completeness of the deviation, i.e., whether it was co-mingled with the performance of duty or involved abandonment of duty; (3) the extent to which the practice of horseplay had been an accepted part of the employment; and (4) the extent to which the nature of employment may be expected to include some horseplay. (Citations omitted)

In this instance, even if one prefers the testimony of Greenhaw over that of the claimant, the claimant was still performing employment services and any deviation would not be so serious as to preclude an award of benefits. It is clear that the claimant was not allowed to leave her work area, even if she was not working on the line. In this instance, there was no dispute that the claimant staying in her workstation was

due to the employer's direct instruction. Additionally, the employer benefitted from her remaining in her area because her presence would facilitate being able to resume her duties more quickly once the line in front of her was caught up.

As to the extent and seriousness of the claimant's deviation from work duties, I find the claimant's deviation would have been minor in nature. Even if one relies on Greenhaw's testimony, she was simply waiting for work and passing time. Likewise, the evidence shows that due to the nature of the claimant's work, employees would often talk and sing. Greenhaw even went so far as to indicate that during these times the workers would dance. I note there is no evidence to show that such behavior was discouraged. I also note that due to the nature of the employees' work and the corresponding delays, such behavior could be expected by the employer. Ultimately, because the workers were required to perform manual labor that did not require intense concentration or silence, and since they were forced to stand in a small area and wait extended periods of time with no work or other activities to keep them busy, I can only conclude that even if the claimant

kicked her leg in the air, it would not be an activity that would bar her from receiving benefits.

In conclusion, I find that the Majority erred by concluding that the claimant did not consistently report her injury as being due to a twisting incident. I further find that the claimant was not engaged in horseplay at the time of her injury and that even if her injury was due to falling after kicking her leg in the air, she should not be precluded from receiving benefits.

For the aforementioned reasons, I must respectfully dissent.

SHELBY W. TURNER, Commissioner